Supreme Court, U.S.
FILED

99 311 JUN 10 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

MICHAEL PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL PEREZ
Petitioner, Pro Se
F.C.I. Schuylkill
P.O. Box 759
Minersville, Pennsylvania 17954-0759
Unit 3B

154225

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

115 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err when it failed to adjust the Defendant's sentence to the extent that the Government became a co-defendant-protector of the bulk of the accused criminal activity?

2. Did the Court of Appeals err for affirming a four point leader/organizer enhancement of a Defendant effectively among equals and independent customers?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	3
Issue I: Sentence Manipulation	3
Certiorari Should Be Granted To Address An Issue Of Fundamental And Recurring Importance Which Is Being Divisively Treated By The Circuits.	3
Summary Of The Petitioner's Position	3

Contents

		Page
A.	Statement Of The Issue As Related To The Petitioner.	3
B.	A Split Exists Among The Circuits Over The Proper Treatment To Be Afforded Excessive Government Involvement In The Creation Or Perpetuation Of The Criminal Offense Of Conviction When The Defendant Is Sentenced For His Crimes.	6
C.	Historical Development And The Current State Of Supreme Court Law On Entrapment And Outrageous Government Conduct.	7
D.	Application Of Objective Principles To The Current Case.	11
	1. Protection of the Common Weal. .	12
	2. The Welfare of the Citizen-Defendant.	15
E.	Proposed Treatment Of This Sentencing Manipulation.	16
Issue II: Sentence Manipulation		19

Contents

	Page
Certiorari Should Be Granted To Address The Issue Of Sentence Manipulation Of Collateral Sentencing Matters Which Possess Inordinate Prejudice Compared To Their Actual Significance.	19
A. The Five "Participants".	23
Conclusion	27

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown v. United States, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958) 20

Callanan v. United States, 364 U.S. 587, 81 S. Ct. 321, 5 L. Ed. 2d 312 (1961) 20, 21

Connelly v. Balkwill, 174 F. Supp. 49 (D. Ohio 1959) 19, 20

Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976) 10, 11, 13

Jacobson v. United States, 503 U.S. 540, 112 S. Ct. 1538, 118 L. Ed. 2d 174 (1992) 10, 11

Mathews v. United States, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) 7

Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958) 8, 9

Sorrells v. United States, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 2d 413 (1932) 8

United States v. Bara, 13 F.3d 1418 (10th Cir.), *cert. denied*, 511 U.S. 378 (1994) 7

United States v. Barth, 990 F.2d 422 (8th Cir. 1993) 7

Cited Authorities

	Page
United States v. Bell, 28 F.3d 615 (7th Cir. 1994) ..	24
United States v. Brewer, 1 F.3d 51 (1st Cir. 1993) ..	7
United States v. Calva, 979 F.2d 119 (8th Cir. 1992)	7
United States v. Connell, 960 F.2d 191 (1st Cir. 1992)	7
United States v. DeGovanni, 104 F.3d 43 (3rd Cir. 1997)	22
United States v. Egemoye, 62 F.3d 425 (1st Cir. 1995)	18
United States v. Garcia, 79 F.3d 74 (7th Cir. 1996), *cert. denied*, 519 U.S. 858 (1996)	6
United States v. Gendron, 18 F.3d 955 (1st Cir.), *cert. denied*, 513 U.S. 1051 (1994)	16
United States v. Gibbons, 25 F.3d 28 (1st Cir. 1994)	17
United States v. Greenfield, 44 F.3d 1141 (2nd Cir. 1995)	22
United States v. Hastings, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983)	14

Cited Authorities

Page

United States v. Jones, 18 F.3d 1145 (4th Cir. 1994) 7

United States v. Montoya, 62 F.3d 1 (1st Cir. 1995) 17

United States v. Owens, 70 F.3d 1118 (10th Cir. 1995) 26

United States v. Parrett, 870 F. Supp. 910 (D. Utah 1994) 21

United States v. Raven, 39 F.3d 428 (3rd Cir. 1994) 6

United States v. Rogers, 982 F.2d 1241 (8th Cir.), *cert. denied sub nom., Philip v. United States*, 509 U.S. 912 (1993) 7

United States v. Rosa, 17 F.3d 1531 (2nd Cir.), *cert. denied*, 513 U.S. 140 (1994) 7

United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973) 9, 13

United States v. Santana, 6 F.3d 1 (1st Cir. 1993) 4, 13, 14, 17

United States v. Stavig, 80 F.3d 1241 (8th Cir. 1996) 7

Cited Authorities

	Page
United States v. Torres, 53 F.3d 1129 (10th Cir. 1995)	26
United States v. Tucker, 28 F.3d 1429 (6th Cir. 1994)	11
United States v. Williams, 954 F.2d 668 (11th Cir. 1992)	7
Statutes:	
18 U.S.C. § 88	21
21 U.S.C. § 846	21
28 U.S.C. § 1254(1)	1
United States Constitution:	
Fifth Amendment	1
Other Authorities:	
Francis B. Sayre, "Developments In The Law: Criminal Conspiracy," Harvard Law Review, Vol. XXXV (1921-22)	21
U.S.S.G. § 3.B1.1	1, 22

TABLE OF APPENDICES

Page

Appendix A — Letter Of The Office Of The Clerk, Washington, DC Enlarging Time To File Petition Dated March 22, 1999 ..... 1a

Appendix B — Memorandum Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed October 1, 1998 ..... 2a

Appendix C — Opinion Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated January 13, 1999 ..... 8a

Appendix D — Judgment Of The United States District Court For The Eastern District Of Pennsylvania Dated November 20, 1997 ..... 10a

Appendix E — Excerpts From Perez Sentencing Transcript Dated November 20, 1997 ..... 21a

Appendix F — Excerpts From Volume 5 Of Perez Trial Transcript 23a

Appendix G — Government's Sentencing Memorandum Of The United States District Court For The Eastern District Of Pennsylvania Dated June 3, 1997 ..... 25a

Appendix H — Excerpts From Perez Sentencing Transcript Dated September 9, 1997 ..... 30a

Appendices

	Page
Appendix I — Excerpts From Volume 4 Of Perez Trial Transcript	32a
Appendix J — Excerpts From Volume 3 Of Perez Trial Transcript	40a
Appendix K — Excerpts From Volume 4 Of Perez Trial Transcript	43a
Appendix L — Excerpts From Perez Sentencing Transcript Dated November 20, 1997	46a
Appendix M — Excerpts From Volume 5 Of Perez Trial Transcript	50a
Appendix N — FBI-302 Reporting Statement Of Pedro Prieto Gonzalez Dated June 15, 1994	55a
Appendix O — Excerpts From Perez Sentencing Transcript Dated September 9, 1997	58a
Appendix P — Excerpts From Volume 6 Of Perez Trial Transcript	60a
Appendix Q — Excerpts From Perez Sentencing Transcript Dated September 9, 1997	63a
Appendix R — 1997 Affidavit Of Francisco Hernandez [Sic] In *United States Of America v. Francisco Hernanez*	65a

Appendices

Page

Appendix S — Excerpts From Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Denying Motions For Judgment Of Acquittal And For A New Trial Dated August 26, 1996 ..... 67a

Appendix T — Constitutional Provision Involved . 71a

Appendix U — Relevant Sentencing Guideline ... 72a

Petitioner Michael Perez, *pro se*, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished Opinion of the Third Circuit appears at Appendix B, pp. 2a-5a.[1] The unpublished Judgment & Commitment Order of the district court is found in the App., pp. 10a-20a.

STATEMENT OF JURISDICTION

The Third Circuit decided my case on October 1, 1998. *See* App., p. 3a. My petition for rehearing/rehearing *en banc* was denied on January 13, 1999. *See* App., pp. 6a-7a. Application No. A-774 granted me an enlargement of time to June 11, 1999 to file my petition for certiorari. *See* App., p. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appendix T is the Fifth Amendment to the United States Constitution. *See* App., p. 71a.

Appendix U is U.S.S.G. § 3.B1.1. *See* App., pp. 72a-75a.

STATEMENT OF THE CASE

In 1993, when Mr. Perez came to the attention of law enforcement authorities, he was a person driven by a deep heroin addiction. Although this condition deeply imbued him

---

1. Appendix letters are omitted hereafter. *E.g.*, the reference to Exhibit B, pp. 6a-7a shall be noted as follows: "*See* App., pp. 6a-7a."

into drug trafficking for the support of his habit, he recognized his problem and sought private treatment of his own accord. *See* App., pp. 21a-22a.

When Mr. Perez moved into the distribution of kilograms quantities of cocaine, his margins could be as low as one hundred dollars and rarely as high as $1,500. (Information derived from tapes at trial). In between, there were the slow payers and the inevitable losses. So the profitability was constantly eroded by real world conditions.

On May 15, 1993 authorities sent Nicholas Delgado to buy a kilogram of cocaine from Mr. Perez. By that time they had been directly investigating Perez for over three months and listening to his telephone calls since February 16, 1993. They knew his associates, his modus operandi, his drug habit and his financial condition. The controlled buy, therefore, appeared to be the cap to the investigation.

Instead, the investigation simply continued as it had before. Perhaps investigators hoped that Mr. Perez would seek to expand his sources of supply or customer base. But a month after May 15, they knew he was dealing with all the same people and no others. The only thing changing was the amount of cocaine the customers were buying; Nicholas Delgado, by his own later admission, dealt with Mr. Perez on at least twenty occasions after the controlled buy for his own personal profit. Investigators say that they only learned of this fact after they recovered an accounting slip from Mr. Perez at his arrest naming Delgado as owing for twenty kilograms.

When the investigation was finally declared "over," it was eleven months and an alleged three hundred kilograms of cocaine past May 15, 1993. Only Mr. Perez and Edwin Rodriguez were arrested as principals to the drug operation;

of the seventeen defendants, only one drug courier from New York had been added to the list of known people that had not been known by May 15, 1993.

In a touch of ultimate irony, one co-defendant to the case, Mr. Pedro Pietro, was the Defendant's drug counselor. *See* App., pp. 23a-24a.

The only material change to the circumstances in the intervening year was the accumulation of an astronomical quantity of cocaine that authorities admitted had all been sold into the City of Philadelphia and the gross inflation of the Defendant's liability for laundering money.

REASONS FOR GRANTING THE WRIT

ISSUE I: SENTENCE MANIPULATION

CERTIORARI SHOULD BE GRANTED TO ADDRESS AN ISSUE OF FUNDAMENTAL AND RECURRING IMPORTANCE WHICH IS BEING DIVISIVELY TREATED BY THE CIRCUITS.

SUMMARY OF THE PETITIONER'S POSITION

A. Statement Of The Issue As Related To The Petitioner.

When present in a criminal controlled-substance case, the practice of sentence manipulation has the full potential to undercut the constitutional legitimacy of the defendant's ultimate sentencing. All the Circuits which allow a defendant to present a claim of manipulation of his conduct at his criminal sentencing have invoked a standard that the defendant must show a level of unacceptable outrageousness to the Government's actions. Discussion, *infra*. What has been overlooked is that in a controlled-substance case that

standard is immediately met; for if drugs are the absolute evil that they have been portrayed and legislated to be, it must follow that any case where the Government allows their distribution into the community satisfies the outrageous standard. It cannot be otherwise.

If it is permissible for the Government to cause or perpetuate a drug harm, then the "drug evil" cannot be absolute. The Government appears to perform or condone drug distributions routinely in the name of a greater "investigation." *United States v. Santana*, 6 F.3d 1, 5-6 (1st Cir. 1993) (discussing various scenarios in which Government distribution of drugs has been condoned; collecting cases). But if all that the Court is dealing with is relative, and the proscription is ambivalent, then it is not justifiable to superimpose absolute standards of sentencing over again, after having dispensed with them to create the sentencing situation. Yet, all the culpability is routinely visited on the criminal defendant in a drug-case sentencing by a determinant sentencing system. And it has been in this case:

> The District Court found that the Government did not engage in sentencing entrapment, see DA 291, and *we see no basis to disagree*. In any event, we have never approved a downward departure based on sentencing entrapment and decline the invitation to do so in this case.

See App., p. 4a.

The problem in this case is that the Government has been responsible for the distribution of the cocaine to an absolutely inordinate degree, so much so that Mr. Perez satisfies any standard of what a community would expect from its law enforcement agents. Mr. Perez could have been arrested in

May of 1993 when he was dealing his first kilograms in this case; he was outright caught in a sting operation where the Government bought one of those kilograms for $24,000. But instead of arresting Mr. Perez, he was allowed to keep the money and finance his larger scale dealing. Then he was allowed to continue in a *protected* business for eleven more months, until he had distributed between 150 and 300 kilograms of cocaine into the community!

The problem with the Government's participation in these events is that, except for its motive (which is legally irrelevant in a public welfare offense anyway), it became a drug dealer by aiding and abetting Mr. Perez instead of stopping him. Mr. Perez can say legitimately that he is primarily a Government-made man in at least two important respects: (1) that the Government seriously helped finance his transition into dealing in generally larger amounts than he had been (the Government informant was a major customer after the controlled buy, admitting to purchasing at least twenty times); and (2) the Government effectively protected all the dealings until it was ready to arrest so that no one else could arrest Mr. Perez. Frankly, Government collusion and incompetence is the *principal reason* why this sentencing reached anything approaching the quantities it did. Ultimately, of course, the Government was forced to admit it accomplished nothing that hadn't been accomplished by May 15, 1993; it should not have taken eleven months to discover that fact.

Accordingly, there are two important reasons why the Government lacks the necessary Constitutional standing to demand a full retribution on this Defendant: it does not stand blameless or only incidentally guilty itself and it cannot claim to have followed any objective or publicly sanctioned standard in its conduct of this investigation. The actions or inactions of the agents were completely *ad hoc* and unsupervised at policy-creating levels of Government.

And with respect to this Defendant, the milieu of his criminal conduct has lost contact with a real world. While part of the Defendant's crime remains real and sufficient for guilt, the greatest measure of his culpability is wholly contrived and artificial. It is quite one thing to permit one or two acts by a defendant in order to define the bounds of his criminality; but nearly every drug dealer is a "kingpin" in his heart simply deprived of opportunity. When that opportunity is supplied by Government largesse, it is no honest characteristic of the person or his circumstances. It is the final proof that the war is about arresting people, not protecting the people.

B. A Split Exists Among The Circuits Over The Proper Treatment To Be Afforded Excessive Government Involvement In The Creation Or Perpetuation Of The Criminal Offense Of Conviction When The Defendant Is Sentenced For His Crimes.

While acknowledging that it has "not yet had the occasion to address the theory of sentencing entrapment," the Third Circuit again finds that no conceivable standard has been met in this case. *See* App., p. 4a; quoted text from *United States v. Raven*, 39 F.3d 428, 438 (3rd Cir. 1994). The Petitioner will argue that this decision is violative of constitutional due process for being utterly standardless. And under the caselaw of the First, Eighth, and Tenth Circuits, the Petitioner would most likely have qualified for relief. Thus, he argues, that certiorari must be granted to resolve the split among the Circuits and set some standards for Circuits to follow in this field of jurisprudence.

At present, the Seventh and Eleventh Circuits have rejected the doctrines of sentencing entrapment or sentence factor manipulation outright. *United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996), *cert. denied*, 519 U.S. 858 (1996);

United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992). Other Circuits have held that sentence factor manipulation is a viable defense, but never found a case which qualified. *United States v. Stavig*, 80 F.3d 1241, 1245 & n.3 (8th Cir. 1996); *United States v. Rosa*, 17 F.3d 1531, 1551 (2nd Cir.), *cert. denied*, 513 U.S. 140 (1994); *United States v. Bara*, 13 F.3d 1418, 1420 (10th Cir.), *cert. denied*, 511 U.S. 378 (1994); *United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992). Some Circuits have treated the subject multiple times. *United States v. Brewer*, 1 F.3d 51, 55 (1st Cir. 1993); *United States v. Barth*, 990 F.2d 422, 424-35 (8th Cir. 1993); *United States v. Rogers*, 982 F.2d 1241, 1245 (8th Cir.), *cert. denied sub nom., Philip v. United States*, 509 U.S. 912 (1993); *United States v. Calva*, 979 F.2d 119, 122-23 (8th Cir. 1992). Only the Fourth Circuit has distinguished between sentencing entrapment and sentencing factor manipulation, expressing "skepticism" about the latter theory. *United States v. Jones*, 18 F.3d 1145, 1153 (4th Cir. 1994). Thus, a situation has been recognized to exist since at least 1992 which arises with regularity in our jurisprudence, produces results differing upon the geographical venue of the case, and possesses no consensus even within these Circuits on how it should be resolved. This is the archetypical nature of a case requiring certiorari and Mr. Perez' example is fully pled in the Courts below by which to evaluate an extreme case.

C. Historical Development And The Current State Of Supreme Court Law On Entrapment And Outrageous Government Conduct.

Six Supreme Court decisions to date address the outrageous government conduct and/or entrapment defense.[2]

---

2. One case, *Mathews v. United States*, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) treats the availability of the entrapment defense where the accused still denies his factual guilt. The content of *Mathews* is not germane to the present issue.

In the first case of entrapment reaching the Court, the issue was framed as a question of police abusing their powers of detection of crime and enforcement of the law by instigating the criminal act. *Sorrells v. United States*, 287 U.S. 435, 448, 53 S. Ct. 210, 77 L. Ed. 2d 413 (1932). The Government argued that the actions of its agent were an extraneous issue to the subsequent legal treatment of the crime. Mr. Sorrells, it argued, could have met a "genuine" person with the attitude of the agent; he had just been selected to be tested and had failed.

Where the Government saw the actions of its agent as a purely superfluous matter, Justice Roberts found those actions to be the crux of the issue. *Id.*, 287 U.S. at 459. Although the majority decided that the overall question presented could be resolved by allowing the accused the right to present evidence of the Government's misbehavior for causing his personal conduct, Justice Roberts would have preceded the exercise of that right with an objective judicial evaluation of the constitutional reasonableness of the Government conduct in fomenting the crime.

This jurisprudence was not revisited until thirty-six years later when the Court heard *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958). There a government informant had been permitted to stalk recovering addicts at a treatment center soliciting them to find him heroin to alleviate the pain of his addiction. The Court held that Sherman had been entrapped. But Justice Frankfurter now urged a proposition similar to that of Justice Roberts that the dispositive question was

> whether the police conduct revealed in the particular case falls below standards, to which

> common feelings responded, for the proper use of governmental power.

Id., 356 U.S. at 382.

After another twenty-five years, the Supreme Court took a case where the agent supplied a small amount of an essential chemical, not a controlled substance, in order to gain the trust and confidence of the subject individuals to his investigation. *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973). This was finally a case to be decided purely on a claim of outrageous government conduct because this particular defendant could not claim to have lacked predisposition. *Id.*, 411 U.S. at 430. The Court decided this case on the degree of illegal government involvement, *i.e.*, the supply of a small amount of a legal chemical capable of being misused, and found that conduct insufficient to constitute an egregious violation of the defendant's right to constitutional due process.

There was a dissent to this balancing approach because the Government had crossed the line into sanctioned criminality by aiding and abetting the ultimate offense. Stewart, J., *dissenting*, 411 U.S. at 441-43. In light of the reasoning of the dissent, even the majority acknowledged that

> . . . we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

Id., 411 U.S. at 432-32.

Now the Court visited this issue again just three years later when it was presented a case where the defendant had

been pincered between a Government informant supplying heroin for sale and a Government informant shamming addiction as a customer. *Hampton v. United States*, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976). Here the Government had furnished an actual illegal substance, heroin, in order to consummate the crime. This definitely crossed the line and identified the Government as a recognized criminal law-breaker.

Nonetheless, the Supreme Court found that the tactic of a single distribution of the controlled substance under such tightly controlled conditions to protect the public weal did not deprive the defendant of due process of law. *Id.*, 425 U.S. at 490. Two Justices, Messrs. Powell and Blackmun, who concurred in the Opinion, would have held that it was fundamentally wrong to analyze only the personal due process rights of the accused. *Id.*, 425 U.S. at 492. The Dissent went further and would have held the prosecution

> barred as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by the Government agent.

Id., 425 U.S. at 501. For the dissenting Justices, some standards had to be drawn rather than treat every example of an entrapment/outrageous case on an *ad hoc* basis. The example of the Government engaging in criminality itself in order to allegedly fight crime was a readily identifiable brightline with obviously real meaning to the Public.

Current Supreme Court teaching on this jurisprudence has failed to address the possibility of restraints on Governmental power to detect and investigate crime but focused instead on an objective brightline test of the conduct of the defendant. *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1538, 118 L. Ed. 2d 174 (1992). So now the

prosecution is obliged to show in a case of the defendant claiming entrapment that the accused was disposed to commit the crime at the first instant he was contacted by a Government agent.

> Today, the Court holds that Government conduct may be considered to create a predisposition to commit a crime, even before any Government action to induce the commission of the crime.

Id., 503 U.S. at 556. Thus, there has not been a position taken at the highest levels of our jurisprudence to define the boundaries of acceptable Government conduct since *Hampton* in 1976. In *Jacobson*, the Supreme Court has exhibited great reluctance to allow a criminal defendant to benefit absolutely from the existence of misdeeds by his Government. It has been opined that the theory of objective entrapment is dead. *E.g.*, *United States v. Tucker*, 28 F.3d 1429 (6th Cir. 1994). And the Court is rightly concerned with allowing another wrong to become an undeserved windfall excuse to a criminal defendant for his uncontestable wrongdoing. However, it becomes equally unconscionable to let the substantive acts and omissions of police amounting to chargeable crimes on the community to be excused simply because they were done under the banner of law enforcement. That amounts to the same justification which the Court rejected when sought by the Defendants.

D. Application Of Objective Principles To The Current Case.

This Court must evaluate the facts of this case on two levels: first, toward the protection of the community and, second, for the protection of the person, even if he is the accused. For it is a *de facto* conclusion that overzealous investigations resulting in crimes will never be prosecuted

if the motive is ostensibly pure. And unless it has become the national purpose to utterly destroy all guilty citizens rather than correct people for the evil they do, then Government should not be a positive instrument of human destruction.

1. *Protection of the Common Weal.*

It is a testimony to how jaded the pursuit of the drug war enemy has become that persecution of the enemy becomes more important than preventing the harm. The Third Circuit has been so blasé that it completely ignores the significance and import of the 300 kilograms of cocaine itself having received Government-sponsored safe conduct in to the drug abuse of a community.

> Using the Eighth or First Circuit definition, this Court finds that the Government did not engage in sentencing entrapment. First, the Government officials did not engage in outrageous conduct or extraordinary misconduct, [sic] by merely delaying its [sic] arrest of Defendant Perez after it purchased [sic] one kilogram from him on May 15, 1993. The Government did not try to encourage Defendant Perez to sell larger quantities of drugs at any time therefore; it merely waited to gather more information on him and other potential Defendants. This is not improper. The fact that he was more deeply implicated in a drug conspiracy is not enough.
>
> Next, testimony by at least three witnesses revealed that Defendant Perez received cocaine in quantities ranging from 20-40 kilograms. Therefore, he was already predisposed to dealing much larger quantities of cocaine. Therefore, any relief based on this theory is denied.

See App., p. 69a. The decision of the District Court, quoted above, was accepted virtually *verbatim* by the Court of Appeals. The error by both Courts is the failure to see the positive support of all these later drug sales because it was passive, *i.e.*, non-interference and protective, in character. This protection was ostensibly for the sake of a greater investigation; but in hindsight that reason looks like purely a sham excuse. So the District Court has avoided making any balancing evaluation of result achieved versus the additional harm caused. Conspicuously unacknowledged by the District Court is the fact that the only part of the investigation to inflate during this time was the forfeiture count of the ultimate conviction, not any knowledge about additional dealers or customers. This was not a legitimate reason to continue.

There was a time in the not too distant past when the Government once acknowledged that the loss of just 13 grams of 92% pure heroin into the community was "a quantity, in absolute terms, unprecedented. *United States v. Santana*, 6 F.3d 1, 5 (1st Cir. 1993) (collecting prior case examples involving Government losses of drug). On review, *Santana* was nominally measured against the *Russell* standard, *supra*; but it more properly should have obtained its endorsement from *Hampton* for involving an actual drug. The *Santana* court adopted a wholly subjective and relative *ad hoc* basis for rendering its decision that there was no outrageous Government conduct present upon which to justify outright dismissal of the 13 gram distribution count of conviction.

The Government's justification, and the First Circuit's rationalization, in *Santana* represents a full quantum of extension of this Court's guiding principles in *Hampton*. Rather than total control, Judge Selya utilizes a risk/benefit analysis:

> But, if the big fish would have devoured millions of little fish, even the most tender hearted marine biologist would be hard pressed to argue against the fisherman's use of the net.

Santana, *id.* at 8. It does not need to be emphasized that the present case now constitutes a mega-factor enlargement on even the *Santana* principles of analysis. In hindsight, the Government's proposed justification must be acknowledged to be wholly gratuitous. This constitutes the point where the Courts must intervene to protect society from reckless law enforcement or law enforcement motivated by the greater recognition of the large prosecution. In such situations, the Courts of *nisi prius* must be given standards by which to guide the use of their supervisory power. *United States v. Hastings*, 461 U.S. 499, 505, 103 S. Ct. 1974, 1978, 76 L. Ed. 2d 96 (1983): A federal court

> may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.

Ibid.

There can be no mistake that the necessary situation is present in this case where the District Court would have been fully authorized to act. Without the silent partnership of the United States Government, no distribution of three hundred kilograms would have been possible. The Government conduct was illegal and prosecutable. Under such circumstances, the silence of the Courts becomes a subject for deep reflection and concern. It is a mockery not to treat the Government for what it has become but visit the total retribution on the Defendant. There is no distinction to public welfare guilt. The reputation of the Court and the welfare of the community are two of the imperatives recognized in *Hastings*.

2. *The Welfare of the Citizen-Defendant.*

Another aspect which is impacted in the District Court and Court of Appeals dismissive attitude toward any sentencing manipulation claim is the complete demonization of the Defendant. Such attitude is unfounded and impermissibly oversimplified the case facts. The proper application of the criminal law has long and very often been attributed by offenders as having saved them from their ultimately self-destructive behavior. That characteristic would have been a beneficial result of this case, but is completely unreferenced by the legal review.

Especially during the time of this conspiracy, Mr. Perez was acknowledged to have had a serious heroin addiction. Support of this habit was the principal reason propelling him into this drug trafficking. But as recounted in the Relevant Facts section, the profits at this level of distribution are the lowest of any point in the process. Mr. Perez sometimes sold a kilogram of cocaine only $100 over his own cost because he had to maintain volume to be competitive. The recorded phone conversations are replete with the dickering for price that forms an everyday part of the business at this level. Thus, even a $1,000 turnover, *i.e.*, the usual rate, was readily dissipated in a heroin habit costing $200 to $300 per day.

With agents so intimately connected to Mr. Perez' telephone life, they could hardly fail to see the driving force behind his labors. They even monitored his calls with his drug counselor when, after admitting his problem to himself, Mr. Perez sought help on his own initiative. It constitutes the ultimate cynicism that the drug law has so poorly served Mr. Perez himself, one of its penultimate victims.

The Courts are required to impose the most severe sentences imaginable for offenses in this genre and have an

inherent duty to evaluate the ultimate legitimacy of those sentences when they are finally applied to a living person. The evaluation in this case erroneously stopped with a mechanical evaluation of numbers. That it may not in good conscience do and still claim Mr. Perez received due process.

E. Proposed Treatment Of This Sentencing Manipulation.

Were the Petitioner to be granted certiorari, he would argue that this case is an example of the type of investigation and prosecution which should be subject to sentencing correction for the presence of extreme manipulation against the penal interests of the Defendant and the common weal of society for the failure to prevent the distribution of an immense amount of cocaine into the community. He would urge that the cumulative analysis of the jurisprudence of the First Circuit is the most appropriate by which to evaluate and correct the situation. The plain fact is that this Petitioner's situation fits so readily into the First Circuit's criteria that it is the *prima facie* example of what the Court should seek to prevent.

The first question to be addressed on review is whether the Government "merely provid[ed] a defendant with an 'opportunity' to commit a crime." *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir.), *cert. denied*, 513 U.S. 1051 (1994). The situation here goes far beyond the offer of an isolated "opportunity" as contemplated in *Gendron*. Like most other Courts to consider sentence manipulation, *Gendron* is still thinking in terms of individual drug deals preceding arrest, not dozens and dozens of preventable kilogram sales. The scope of Government impropriety is envisioned in terms of the single deal, *i.e.*, encouragement to make a larger purchase or sale, the offer of an artificial price to make the deal larger, introducing guns where they were previously not involved, etc. It would be beyond the

comprehension of the *Gendron* panel for the Government to provide an eleven month license at the scale of dealing involved here.

Next is the question of whether the manipulation present reaches such a degree as to implicate either the due process right of the defendant or the public concerns subject to the supervisory powers of the Court. Mr. Perez satisfies this factor by the continuation of the consideration described above. This case contains "elements like these (*i.e.*, origin of the idea, encouragement to proceed, leadership, or protracted latitude to commit crimes, etc.) [that were] carried *to such a degree* that the Government's conduct must be viewed as 'extraordinary' misconduct." *United States v. Gibbons*, 25 F.3d 28, 31 (1st Cir. 1994) (emphasis in the original). The Perez case exhibits such a prolonged tolerance of his cocaine sales that it is incredible to claim any larger investigative purpose. The Government failed to save Mr. Perez from the ruination of his life and it failed to protect society from hundreds of thousands of doses of all forms of cocaine. Frankly, given the knowledge that law enforcement admits possessing, its failure to act was criminal in the true sense of the term. The fact that the cooperating Government informant dealt tens of kilograms at the same time he was supposedly being supervised indicates malfeasance as the least fault of the investigation.

Under the analysis in *Santana*, *supra*, and *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995), the First Circuit identified the essence of manipulation and the evil which the action of the Court is intended to prevent: to stop the Government from "improperly enlarg[ing] the scope or scale of the crime" in order to increase a defendant's sentence. In this case, the period of time that investigators allowed Mr. Perez to deal cannot be balanced by any identifiable legitimate goal. It can only be associated with a purpose of

inflating the sentence to be imposed by a determinant sentencing system and likewise inflate the possible forfeitures and seizures of property involved. For example, if Mr. Perez had been arrested on May 15, 1993, his liability might have been 15-50 kilograms of cocaine and forfeiture or laundering of $100,000. By delaying the arrest until March 23 of the next year, those numbers became, to Government representation, more than 300 kilograms and $4,000,000. Furthermore, on May 15 there was no allegation of any "Mike Perez Organization," which authorities created out of either to justify their protracted investigation. (*See* discussion in next section). This was the type of statutory and Guideline manipulation realized.

As correction, the First Circuit suggests the following:

> Where the Government agents have improperly enlarged the scope or scale of the crime, the sentencing court has power to exclude the tained transaction from the guideline computations and for purposes of any mandatory minimum statute.

United States v. Egemoye, 62 F.3d 425, 427 (1st Cir. 1995). It is quite clear from the example in *Egemoye* and the Court's discussion therein that the First Circuit perceives much less than the excesses described in this Petition for Certiorari as qualifying to trigger the due process inquiry for the benefit of the Defendant and the evaluation of the gratuitous damage done to the community.

ISSUE II: SENTENCE MANIPULATION

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE ISSUE OF SENTENCE MANIPULATION OF COLLATERAL SENTENCING MATTERS WHICH POSSESS INORDINATE PREJUDICE COMPARED TO THEIR ACTUAL SIGNIFICANCE.

It must now be clear from the discussion in the preceding section that the accumulation of drug quantity culpability by improperly extending the investigation might also affect collateral sentencing factors, such as the leader/organizer enhancements. The undue influence of the investigation in this case has produced a distinction corresponding to drug quantity for what is truly real and what has the taint of Government manufacture for its existence. One identifiable spillover effect of so long an investigation and allowed trafficking was the creation of an outright label, the "Mike Perez Organization," which did not exist on May 15. This labeling subtly influenced the District Court, Petitioner submits, into uncritically analyzing what type of defendant conduct comprised this trafficking crime in order to impose the full four-level enhancement. This enhancement of offense level produced a change from a best possible sentence of 235 months to a best possible of 360 months, which the Petitioner actually received. An enhancement of this scale was constitutionally unwarranted for the conduct which was truly attributable to Mr. Perez.

First, it is necessary to place conspiracy offense enhancements in perspective for their actual culpability in order to appreciate exactly how susceptible a great prejudice is to so little manipulation. The harm to society from a conspiracy resides not in the existence of an agreement at all but in the tort resulting from what the agreement accomplishes. *E.g.*, *Connelly v. Balkwill*, 174 F. Supp. 49

(D. Ohio 1959) (the tort of conspiracy is the tangible harm created; a civil cause of action is not created by the agreement alone without the harm). Frankly, in the criminal arena there is nothing about the heinousness of the crime that cannot be determined from adequate analysis of the substantive offense committed. The retribution owed to society is established on that basis; punishing the inchoate element of the crime appears gratuitous. If it were purely gratuitous, then the restraint upon a sovereign imposed by constitutional due process may prohibit the infliction of penalty. *Brown v. United States*, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958) (prohibition of writ of attainder is primarily a matter of self-imposed governmental restraint, but also a recognition on the limitations of the sovereign).

The concept that conspiracies became more dangerous than similar crimes perpetrated by individuals formally began with a conclusory statement of *dicta* in *Callanan v. United States*, 364 U.S. 587, 593, 81 S. Ct. 321, 5 L. Ed. 2d 312, 317 (1961):

> [C]ollective criminal agreement — partnership in crime — presents a greater potential threat to the public than individual delicts.

The fallacy, of course, is to equate "dangerousness" or "potential threat" with actual harm. While it may be possible in certain circumstances that the workings of a conspiracy produce a harm not encompassed by the proscribing statute, that situation is a rarity and *none* of the existent body of caselaw that your Petitioner has studied has produced an actual example of additional *harm* not encompassed by the penalty for drug quantity alone. And, regardless of the hypothetical possibility, none of the conspiracy laws were enacted for this reason.

When promoted for their enactment into law, none of the conspiracy statutes were ever offered on the basis of affording a method by which to compound the retribution visited on a defendant. Indeed, the original dismissive attitude toward conspiracy crimes, ranking them only as misdemeanors without the commission of the substantive crime itself, caused the penalty for the first federal conspiracy statute, 18 U.S.C. § 88, to be intentionally kept modest at five years. Francis B. Sayre, "Developments In The Law: Criminal Conspiracy," Harvard Law Review, Vol. XXXV, pp. 393-427 (1921-22).

Therefore, instead of being for retribution, all the original conspiracy statutes were promoted for the wholly proper reasons of supplying for the first time a statutory vehicle: (1) by which law enforcement could reach the masterminds of substantive crimes who distanced their participation from the actual deed, and (2) by which law enforcement could act preemptively in order to stop a crime before it materialized into a dangerous attempt. *Ibid.* The idea that the conspiracy added to the harm was not an aspect that was even believed at the time. It was still a widely held belief that when the substantive crime which was the object of the conspiracy was committed, the conspiracy leading to that offense was subsumed into the prosecution for the actual offense on society. *Callanan*, *supra*, 364 U.S. at 589.

But after passage of the original federal conspiracy law, it was soon argued that a five year maximum penalty might underrepresent the gravity of certain conspiracy offenses, like conspiracy to murder a federal official or conspiracy to violate civil rights. For a brief discussion, *see United States v. Parrett*, 870 F. Supp. 910, 911 (D. Utah 1994) (remarking on annotator's explanation of 1948 revisions to the conspiracy laws). For these early special offenses, and then for the original form of 21 U.S.C. § 846 enacted later, the

Court was authorized to sentence a convicted defendant for the same penalty as the substantive offense which was the object of the conspiracy, whether the final crime was achieved or not. But the sentencing court was always left free to exercise sound discretion in sentencing beyond the normative five year maximum penalty of general conspiracy. That was, of course, before the present era of determinant sentencing. Now the assessment of the District Court is pretty much reduced to a status determination whether some condition is present or not.

These brightline evaluations are what are fraught with opportunities for manipulation. The presence of the status triggers the penalty regardless of what that status really means in the context of the criminal offense. So extremely minor assistance, for example waiting for a phone call, relaying a message, receiving money, etc., that more properly amount to just convenience and not necessity are not distinguished from the instances of assistance that are essential to the functioning of the conspiracy. Nor is any distinction generally made between assistance performed either without any thought at all or as a favor and that assistance which is truly commanded. Fortunately, some Circuits recognize the necessity of these distinctions in the interpretation of Sentencing Guideline § 3B1.1 and demand a showing that the defendant exercised "direct and immediate control" over other participants. *E.g.*, *United States v. Greenfield*, 44 F.3d 1141, 1146-47 (2nd Cir. 1995). Such a finding was required in this case by Third Circuit law. *E.g.*, *United States v. DeGovanni*, 104 F.3d 43, 45-46 (3rd Cir. 1997) (must be some degree of control over others involved in the commission of the offense). But what was done here from lengthening the investigation was that agents were able to accumulate various and isolated instances and portray them as demonstrating a control that was neither substantial nor regular in real fact; the size of the drug quantity became the

surrogate for any penetrating proof of leadership. An example of the thinness of proof which the Government expected is contained in its Pre-Sentencing Memorandum. *See* App., pp. 25a-29a.

A. The Five "Participants".

In the sentencing of September 9, 1997 (*see* App., p. 30a), the District Court considered the leader/organizer enhancement for this case. Although on earlier occasion the Government has named other individuals that it said were supervised by Mr. Perez, in the final determination it named five persons: Fabiola Echeverry, Nelson David Guzman (a.k.a. Ramon Antonio Moya), Francisco Hernandez, Pedro Pietro Gonzales, and Ricardo Haines. Brief discussion of the participation identified for each of these individuals places this four point enhancement in its true context.

Of course, in this review this Court should be mindful that the vast majority of the conduct described occurred after May 15, 1993. Regardless, this was the best activity that the Government could offer in order to sanction coining the term, "The Mike Perez Organization," and presumptively these are the principals to that "organization."

Of all the people who potentially could legitimize a leader/organizer enhancement for activities before May 15, Fabiola Echeverry seems to be the most reasonable. But at trial the Government was forced to acknowledge that Ms. Echeverry was a serious cocaine dealer in her own right and the potential equal to Mr. Perez. Ms. Echeverry admitted under oath to dealing in serious amounts of cocaine before ever meeting Mr. Perez. *See* App., p. 33a. She had full kilogram customers for cocaine on her own throughout the conspiracy, such as Susana Rosa. App., p. 34a. At her arrest, she had records proving her own serious drug trafficking present in her home. App., p. 39a.

These activities were all wholly independent of Mr. Perez, but the Government did not attempt to distinguish them for what it alleged had been done *for* Mr. Perez.

At one point during the telephone intercepts, Ms. Echeverry is receiving ten kilograms of cocaine and asks the Defendant if *he* wants to buy any. App., pp. 40a-42a. And the Government attempted to portray a call after May 15 as Ms. Echeverry receiving a quotation for cocaine in behalf of Mr. Perez simply because the call was intercepted on the Defendant's cellular telephone. In point of fact, the agents making this claim knew that the phone was broken and only capable of making outgoing calls: Ms. Echeverry was making the call to the supplier for herself! App., pp. 43a-45a.

Without a doubt, Ms. Echeverry was a relative equal to Mr. Perez in her conduct throughout this conspiracy. While they lived together until August of 1993, they shared a mutuality of interest that is virtually indistinguishable. There was certainly no superior to inferior relationship as is required for the proper imposition of the enhancement. *United States v. Bell*, 28 F.3d 615 (7th Cir. 1994) (neither defendant exercising any materially greater responsibility over the other). If a demonstration of the "supervised person's attitude were necessary for the enhancement, then this enhancement would *a fortiori* fail:

> Court: So did you have an agreement with you and at least another person to distribute cocaine?
>
> Echeverry: No, I didn't have that.

App., pp. 46a-47a. This candid statement shows that Ms. Echeverry viewed herself as completely independent. What

gives the false impression of Ms. Echeverry being supervised at all is a misplaced stereotyping of the male and female roles[3] and the false reliance on the quantity alone for seeming to *necessitate* subordinates to assist, which was never true.

The Government was also something less than complete in its analysis of what it knew about Nelson Guzman (Ramon Moya). For purposes of this enhancement, authorities portray Guzman as keeping stash houses for the Defendant. *See* Sentencing Memorandum, App., p. 28a. But it knew that Guzman was an independent crack dealer who controlled the corner at 7th and Jefferson in North Philadelphia. App., p. 48a. The properties, therefore, were used for his packaging operations, making them completely unsuitable for Mr. Perez as stash houses. *Ibid.* But this simple critical fact went completely unmentioned at sentencing.

Furthermore, the one time authorities know of Mr. Guzman selling powder cocaine at one house, it was a sale of one kilogram purchased from a local dealer named Catano. *See* App., pp. 50a-53a for detail. This was a completely personal sale with nothing to do with Mr. Perez. In fact, Count 2 of the indictment (this sale) was redacted for the above reasons; but the drug sale was improperly resurrected at sentencing as supposed proof of an "organization."

Finally, Mr. Guzman openly testified that he bought from many sources besides Mr. Perez, based on all the usual market factors. *See* App., p. 53a. And other witnesses who understood their relationship called Mr. Guzman and Mr. Perez customer and supplier, respectively — nothing more. *E.g.*, *see* F.B.I. 302, App., pp. 55a-57a. It is a plain fact of this jurisprudence that customers do not count as persons led or supervised absent explicit instructions on how they

---

3. It should be noted that Ms. Echeverry was about fifteen years senior to Mr. Perez.

are to sell the drugs. *United States v. Torres*, 53 F.3d 1129, 1142-43 (10th Cir. 1995).

The stories to the other three "participants" are far less extensive than those to Ms. Echeverry and Mr. Guzman. The Government said at sentencing, App., p. 58a, that Ricardo Haines told authorities that he once helped the Defendant to unload 40 kilograms of cocaine. Otherwise, he was a customer who bought drugs wherever it was convenient. *See* App., pp. 60a-62a. Mr. Perez's drug counselor, Pedro Pietro Gonzales, admitted allowing Mr. Perez to store money in the basement of his home, but no drugs, "for a while." But he did so purely as a favor, not because he was ordered. App., p. 55a. And Francisco Hernandez, when he learned that he would be identified as an alleged member of the "Mike Perez Organization," produced an affidavit of denial for Mr. Perez to use at sentencing. App., pp. 65a-66a.

In short, these people are the "backbone" of the alleged "Mike Perez Organization." Clearly there has been an inflation of roles here or a dilution of the function necessary to actually lead or organize. What makes it possible for the reviewing Court to take such an uncritical posture in endorsing this enhancement is the overshadowing drug quantity. That number guarantees that the offense appears extensive, but that is not an honest reason for this enhancement when the taint of Government influence on the facts is removed.

The Petitioner, therefore, urges this Court to promulgate a standard which parallels the analysis described by the Tenth Circuit in *United States v. Owens*, 70 F.3d 1118, 1127-1130 (10th Cir. 1995). The position of the supplier in a drug conspiracy is always an important and even essential position with respect to the conspiracy's overall success. But the fact that the supplier is always an important figure cannot be

confused for the characteristics which constitute *forceful* promotion of drugs into the community. If there is a characteristic which makes conspiracy more dangerous to society than an individual delict, it is the potential for motivation of many over what they would do for themselves alone. The Government here, however, has been able to skew the Third Circuit's review on this issue by just its impermissible inflation of the criminal conduct, which seemed to make the foregoing analysis superfluous.

Certiorari should issue to resolve all the misplaced metaphors present in this and so many drug offense cases.

CONCLUSION

The concerns of this Petition reach an increasing number of prosecutions for drug offenses. Failure to address this example can only produce examples of greater magnitude from other litigators. But the current example is so extreme that it is impossible to see a reason to postpone consideration of the issues for better or different characteristics.

Wherefore, the Petitioner respectfully prays that this Court will grant the Writ of Certiorari and order a full briefing by the parties opponent.

Respectfully submitted,

MICHAEL PEREZ
Petitioner, Pro Se
F.C.I. Schuylkill
P.O. Box 759
Minersville, Pennsylvania 17954-0759
Unit 3B